the agency was primarily for the benefit of the beneficiary, the agent owed the beneficiary a legal duty to remit the premiums promptly, for breach of which the former would be liable to the latter in an action on the case for negligence.

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FRAUD AS A BASIS FOR SETTING ASIDE A JUDGMENT.—Under what circumstances may fraud be a ground for vacating a judgment in equity? This question has been reopened by a series of recent cases, one of which, *Chicago, R. I. & P. Ry.* v. *Callicotte*,[1] endeavors to answer the much vexed problem of the federal rule in such cases. A bill in equity was brought in the federal court to set aside a judgment obtained in a former action by the present defendant against the present plaintiff on the ground that the injuries on which the defendant's recovery was based were spurious, and that the witnesses of both plaintiff and defendant were induced thereby to believe the defendant was really paralyzed when in fact he was only shamming. The court held that this was such fraud as would vitiate a judgment and cause equity to set it aside.

The general confusion of the law on this point is due to the fact that two fundamental principles come into conflict. On the one hand, the rule that fraud vitiates all things, and that equity will prevent the enjoyment of any advantage so obtained, would give equity jurisdiction in every case in which fraud could be proved. On the other, the doctrine of *res adjudicata*, and the principle contained in the maxim *"interest rei publicae ut sit finis litium"* would prevent equity from setting aside a judgment for any reason.[2] As might be expected, the courts' effort to reconcile the two has led to a series of cases which are clear enough at either extreme, but blend in the center into a hazy region of uncertainty.

The rule that has been laid down by equity courts to solve the enigma is that "extrinsic" or "collateral" fraud will cause the judgment to be set aside; that "inherent" fraud will not.[3] And under this rule it is fairly clear that, at the one extreme, fraud on which the cause of action itself is based is inherent fraud, and will not be re-examined;[4] and that at the other extreme, fraud which prevented the defendant from having a fair trial or from setting up a defence he would otherwise have had, is extrinsic fraud, and will cause equity to interfere.[5]

But where the fraud complained of consists of false evidence in the form either of perjured testimony or of forged documents, there is an irreconcilable conflict. The rule is not abrogated; but some courts say that perjury is collateral fraud, and therefore a ground for interference;[6] and others that it is inherent fraud, and therefore not such a ground.[7] However, it seems the former

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[1] (C. C. A. 1920) 267 Fed. 799. Other recent cases raising the same question are: *McGehee* v. *Curran* (Cal. 1920) 193 Pac. 277; *Morgan* v. *Asher* (Cal. 1920) 193 Pac. 288; *Hollingshead* v. *Hollingshead* (Okla. 1920) 193 Pac. 412.

[2] See (1921) 9 California Law Rev. 156.

[3] See *United States* v. *Throckmorton* (1878) 98 U. S. 61; Wells. *Res Adjudicata* (1878) 427; *contra, Crawford* v. *Crawford* (S. C. 1811) 4 Des Saus. Eq. 176.

[4] *Marine Ins. Co.* v. *Hodgson* (1813) 7 Cranch 332.

[5] *Moffat* v. *United States* (1884) 112 U. S. 24, 5 Sup. Ct. 10; *Pearce* v. *Olney* (1850) 20 Conn. 544; *Wierich* v. *De Zoya* (1845) 7 Ill. 385; *De Louis* v. *Meek* (Iowa 1849) 2 G. Green 55; *Kent* v. *Ricards* (1850) 3 Md. Ch. 392.

[6] *Stace* v. *Mabbot* (1754) 2 Vesey 552; *Klaes* v. *Klaes* (1897) 103 Iowa 689, 72 N. W. 777; *Laithe* v. *McDonald* (1873) 12 *Kan.* 340; *Rowe* v. *Chicago Lumber Co.* (1898) 50 La. Ann. 1258, 24 So. 235 (*semble*); *Humphreys* v. *Rawn* (Pa. 1839) 8 Watts 78.

[7] *Greene* v. *Greene* (Mass. 1854) 2 Gray 361; *Pico* v. *Cohn* (1891) 91 Cal. 129, 25 Pac. 970, 27 Pac. 537; *Steele* v. *Culver* (1909) 157 Mich. 344, 122 N. W. 95; *Crouse* v. *McVickar* (1912) 207 N. Y. 213, 100 N. E. 697.

courts will allow interference only where the perjury is the work of the prevailing party.[8] The Supreme Court of the United States, to show its utter impartiality, has ruled both ways, and left the spectacle of two cases, one of which holds that false evidence is a ground for reversal,[9] the other that it is not,[10] both of which have been followed,[11] and neither of which has ever been overruled. In fact, when a Circuit Court, somewhat puzzled as to which of the two authorities it would follow, asked for enlightenment,[12] the Supreme Court refused to commit itself by answering.[13]

Certain requirements are common to all the cases. The plaintiff must clearly establish the fraud.[14] He must show that without such fraud the decision would have gone in his favor. And he must make clear his own complete freedom from laches and negligence.[15]

The arguments in favor of each view are thus quite clear, and apparently unanswerable in themselves. On the one side it is urged that the defrauding party is trying to obtain an inequitable advantage, that this is just the sort of thing equity should prevent, and that there are sufficient qualifications to safeguard the rule, so that the courts will not be flooded with litigation.[16] On the other side the argument runs that there must be an end to the trouble and expense of litigation and that if perjury were a ground for equity interference no question could ever be considered settled, as either side could re-open the case *ad infinitum*.[17]

The only possible answer, then, lies in balancing the inconveniences of the two rules, and here the latter view seems to be preferable. For, in the first place, it is perfectly possible that the equity court may have to consider again the very question that was before the court in the previous action, namely, the credibility of a given witness or the authenticity of a document. And there seems no reason why that court is any more competent to try such a question of fact than the tribunal that originally considered it. Secondly, the very argument that the number of cases to which the rule applies is limited by its strict qualifications, makes it permissible to ask, should an indefinite amount of litigation be permitted for the sake of securing questionable advantages to a very small number of litigants? And, finally, the inconvenience to litigants and general public alike of having apparently settled questions re-opened, perhaps at a much later period, seems a cogent reason for restricting the rule as narrowly as is consistent with the general principles of justice.[18] Of course, where the rights of a third person are involved, he may set up the fraud at a later time, but this result is inevitable, since he never had his day in court.[19]

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[8] *Laithe* v. *McDonald, supra,* footnote 7; *Munro* v. *Callahan* (1898) 55 Neb. 75, 75 N. W. 151.

[9] *Marshall* v. *Holmes* (1891) 141 U. S. 589, 12 Sup. Ct. 62.

[10] *United States* v. *Throckmorton, supra,* footnote 3.

[11] *Greenameyer* v. *Coate* (1909) 212 U. S. 434, 29 Sup. Ct. 345; *Nelson* v. *Meehan* (C. C. A. 1907) 155 Fed. 1; *Graver* v. *Faurot* (C. C. A. 1896) 76 Fed. 257; see *Simon* v. *Southern Ry.* (1915) 236 U. S. 115, 125, 35 Sup. Ct. 255.

[12] *Graver* v. *Faurot* (C. C. 1894) 64 Fed. 241.

[13] *Graver* v. *Faurot* (1896) 162 U. S. 435, 16 Sup. Ct. 799.

[14] *Tovey* v. *Young* (1702) Finch, Precedents in Chancery 193 (*semble*); see (1909) 22 Harvard Law Rev. 602.

[15] *Bateman* v. *Willoe* (1803) 1 Sch. & Lef. 201; *Smith* v. *Lowry* (N. Y. 1814) 1 Johns. Ch. 320; see (1916) 16 Columbia Law Rev. 74; Bigelow, *Fraud* (1877) 176.

[16] See (1909) 22 Harvard Law Rev. 602.

[17] See *United States* v. *Throckmorton, supra,* footnote 3.

[18] A good example of the possible injustice which would otherwise result is *Greene* v. *Greene, supra,* footnote 7, where a bill was brought to set aside a decree of divorce obtained some time before.

[19] *Rex* v. *Duchess of Kingston* (1776) 20 Howell's State Trials 355. Here

If this rule is adopted, there is still no reason why it should not be construed liberally, and a substantially just result reached in such cases as the instant one. There, it was not only the perjury of the defendant, but the innocent but mistaken testimony of other witnesses, including those of the railway company itself, induced, however by the fraud of the plaintiff, that secured the verdict. The jury was given no opportunity to detect the fraud by passing on the credibility of the expert witnesses, since their testimony was given in perfect good faith. In other words, the fraudulent representations of the defendant, out of court, prevented the present plaintiff from interposing a defence he could otherwise have used. And there is little doubt that a different result would then have been reached in the original action. Thus, the instant case could be decided in the same way under either of the two lines of federal decisions.

As for the federal rule itself, it must still remain unsettled. Since the courts are at liberty to cite either line of authorities, and do so as suits their convenience, the only possible answer in spite of repeated assertions that the federal rule is clear, is that there is no federal rule at all. And there will be none until one or the other of the conflicting decisions is overruled.

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TELEGRAMS BETWEEN POINTS IN ONE STATE PASSING THROUGH AN ADJOINING STATE—The brief opinion of the United States Supreme Court in the recently decided case of *Western Union Telegraph Co.* v. *Speight*[1] recalls again the controversy whether commerce between two points in one state but passing en route through an adjoining state constitutes interstate commerce. And if it does, are state laws governing the liability of a defendant engaged in such commerce inapplicable under all conditions? In this case a telegram was transmitted from Greenville, N. C., to Rosemary, N. C., but routed by the company through two relay points in Virginia. Since the suit was based on mental anguish caused by the negligence of the defendant, for which North Carolina allows a recovery,[2] the company defended on the ground that the message was interstate, so that its liability was determined by the federal rule which denies recovery for mental anguish alone.[3] The jury found that the defendant sent the message through Virginia for the "purpose of fraudulently evading liability under the laws of North Carolina", and gave the plaintiff a verdict. The trial judge set this aside "as a matter of law", and on appeal the State Supreme Court set aside the non-suit and ordered judgment entered on the verdict. Then the United States Supreme Court reversed the judgment on the grounds that the message was interstate in fact and that the court below erred in ruling that the burden was on the company to prove that it had not routed the message through Virginia in order to evade the state's jurisdiction. The court said the burden was on the plaintiff to make out her case. Justice Holmes scrupulously avoided deciding whether the company's motive were material, and if it were, what the theory of the plaintiff's recovery would be. The case, however, does decide that the message was interstate in fact, and in the dictum we learn that if the company had adopted an unreasonable method of transmission, "the liability, if it existed, would not be a liability for an intra-

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the state was allowed to prosecute for bigamy where the defendant had previously obtained a fraudulent divorce.

[1] (1920) 41 Sup. Ct. 11.

[2] *Bright* v. *Western Union Tel. Co.* (1903) 132 N. C. 317, 43 S. E. 841; *Green* v. *Western Union Tel. Co.* (1904) 136 N. C. 489, 49 S. E. 171.

[3] *Stansell et al.* v. *Western Union Tel. Co.* (C. C. 1900) 107 Fed. 668; *Western Union Tel. Co.* v. *Burris* (C. C. A. 1910) 179 Fed. 92; *Southern Exp. Co.* v. *Byers* (1916) 240 U. S. 612, 36 Sup. Ct. 410.